

FEDERAL MAGISTRATES COURT OF AUSTRALIA

CAO v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 225

MIGRATION – Migration Review Tribunal – partner visa – effect of sexual infidelity on mutual commitment to shared life as husband and wife to the exclusion of all others – whether open to the Tribunal to not be satisfied that the sponsorship had ceased – whether s359A letter adequately explained relevance of information – application dismissed.

Migration Act 1958, s.359A

Migration Regulations 1994, reg.1.15A, 1.20, Sch 2 cl.801.111, 801.221

Procedure and Advice Manual, schedule 2.801.2

Nguyen v Minister for Immigration & Anor [2006] FMCA 657

Re Minister for Immigration & Multicultural Affairs and Ors; Ex parte Holland (2001) 185 ALR 504

SZEEU v Minister for Immigration & Multicultural Affairs [2006] FCAFC 2

SZELA v Minister for Immigration & Anor [2005] FMCA 1068

Tran v Minister for Immigration & Multicultural Affairs (2003) 126 FCR 199

Applicant:	THU HIEN CAO
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	MLG 682 of 2006
Judgment of:	Riley FM
Hearing date:	23 February 2007
Date of Last Submission:	23 February 2007
Delivered at:	Melbourne
Delivered on:	21 March 2007

REPRESENTATION

Counsel for the Applicant:	Mr Fernandez
Solicitors for the Applicant:	T.A. Fernandez
Counsel for the First Respondent:	Mr Wee
Solicitors for the First Respondent:	DLA Phillips Fox

ORDERS

- (1) The title of the proceeding be amended so that the name of the first respondent is “Minister for Immigration & Citizenship”.
- (2) The application filed on 25 May 2006 be dismissed.
- (3) The applicant pay the first respondent’s costs, fixed in the sum of \$5,000.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 682 of 2006

THU HIEN CAO
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application filed on 25 May 2006 seeking judicial review of a decision of the Migration Review Tribunal (“the Tribunal”) dated 25 May 2006. The decision affirmed a decision of a delegate of the first respondent refusing to grant the applicant a partner visa.

Background

2. The applicant is a forty-three year old citizen of Vietnam. She arrived in Australia on 10 April 2004 on a prospective marriage visa. On 15 April 2004, the applicant married Mr Van Huong Duong (“the sponsor”).

3. On 14 May 2004, the applicant lodged a combined visa application for a subclass 820 (temporary) and subclass 801 (permanent) partner visa. On 18 May 2004, the applicant was granted a subclass 820 visa. On 28 February 2005, a delegate on the first respondent refused to grant the applicant a subclass 801 visa.
4. On 15 March 2005, the applicant applied to the Tribunal for review of the decision of the delegate. On 27 April 2006, the Tribunal handed down its decision affirming the decision of the delegate refusing to grant the applicant a partner visa.
5. On 25 May 2006, an application for judicial review of the Tribunal's decision was filed in this Court. Contentions of fact and law were filed by the applicant on 6 September 2006, and by the first respondent on 22 September 2006.

The legislation

6. The criteria for the grant of a subclass 801 visa are set out in clause 801.221 of the *Migration Regulations 1994* ("the regulations") which relevantly provides:

801.221 – Criteria to be satisfied at the time of the decision

(1) The applicant meets the requirements of subclause (2), (2A), (3), (4), (5), (6) or (8).

(2) An applicant meets the requirements of this subclause if:

(a) the applicant is the holder of a Subclass 820 visa; and

(b) the applicant continues to be sponsored for the grant of the Subclass 820 (Spouse) visa by:

(i) the sponsoring spouse; or

(ii) the Australian citizen, Australian permanent resident or eligible New Zealand citizen who sponsored the applicant for that visa; and

(c) the applicant is the spouse of the sponsoring spouse; and

(d) subject to subclauses (6A) and (7), at least 2 years have passed since the application was made.

...

(7) Nothing in paragraphs (2) (d) and (2A) (c) prevents the Minister, less than 2 years after the application is made:

(a) refusing to grant a Subclass 801 visa; or

...

7. “Spouse” is relevantly defined in regulation 1.15A as follows:

1.15A Spouse

(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

(a) in a married relationship, as described in subregulation (1A); or

(b) in a de facto relationship, as described in subregulation (2).

(1A) Persons are in a married relationship if:

(a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and

(b) the Minister is satisfied that:

(i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(ii) the relationship between them is genuine and continuing; and

(iii) they:

(A) live together; or

(B) do not live separately and apart on a permanent basis.

8. ...

(3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:

...

(ae) a Partner (Provisional) (Class UF) visa; or

...

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one party to the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses;

(b) the nature of the household, including:

(i) any joint responsibility for care and support of children, if any; and

(ii) the parties' living arrangements; and

(iii) any sharing of responsibility for housework;

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

- (iii) *any basis on which the persons plan and undertake joint social activities;*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

The first s.359A notice

9. On 3 October 2005, the Tribunal wrote to the application inviting her, pursuant to s.359A of the *Migration Act 1958* ("the Act"), to comment on the following information:
 - *On 17 January 2005 the Department conducted a home visit in Clayton South being your residential address. The Department also conducted a home visit at a separate address in Springvale. Department officers were of the view that the sponsor was living at this address and not with you in Clayton South. A copy of the home visit report is enclosed with this letter;*
 - *The Department received community allegation that your sister had paid the sponsor \$15,000 to sponsor you to Australia as a spouse.*
10. The Tribunal said in its letter that this information was relevant to the review because it raised doubts that the applicant and the sponsor were in a genuine spouse relationship "and in particular the visits suggested that the sponsor does not live with you but lives elsewhere with his former wife and has travelled to Vietnam with his former wife."
11. On 2 December 2005, the applicant's migration agent replied to the notice on behalf of the applicant saying that it was incorrect to suggest that the applicant and the sponsor were living at different addresses on

the basis of the evidence in the home visit report. The applicant argued that such a conclusion could not be drawn because of the corroborative evidence of her niece, the presence of her husband's clothing in the bedroom and the adequate descriptions of the house provided by the husband (given that the conversation was being translated). The applicant also said:

Importantly, "if the Departmental officers were of the view that the sponsor was living at this address" their report would have stated so which it did not...

12. The applicant in her response denied that her sister had paid any money to the sponsor to marry her saying that neither she or her sister have that amount of money in any currency to pay the sponsor to marry her, nor would they consider doing such a thing.

Evidence before the Tribunal

13. At the hearing on 7 February 2007, the applicant provided copies of the following documents (as set out at paragraph 23 of the Tribunal decision):
 - *car park payment notice sent to the sponsor at the Clayton address dated 14 August 2005;*
 - *ATO PAYG Summary in the name of the sponsor at the Clayton address dated 14 July 2005;*
 - *Westpac bank accounts in the joint names of the visa applicant and the sponsor showing the Clayton address dated from April to October 2005 and in January 2006;*
 - *ATO Assessment in the visa applicant's name showing the Clayton address dated 1 November 2005;*
 - *handwritten lease for the new address in Clayton South indicating that the visa applicant and the sponsor are the tenants for the period from 1 May 2005 to 30 April 2006 together with rental receipts from the couple dated from May to November 2005;*
 - *utility accounts in joint names of the visa applicant and the sponsor for the address in Clayton South dated from April 2004 to November 2005;*

- *5 photographs of the couple together in Vietnam and 9 photographs of the couple together with other people in Australia which appear to be taken on the same occasion;*
- *letters and cards sent to the visa applicant and the sponsor at the Clayton address.*

14. The applicant gave oral evidence. She was asked why the sponsor was not present at the Tribunal hearing when his attendance had been expressly requested by the Tribunal. The applicant is recorded in paragraph 25 of the Tribunal's reasons for decision as saying that:

...the sponsor was committed to gambling and had not agreed to attend. He had gone out late last night and had not returned home this morning.

15. The applicant told the Tribunal that she and the sponsor have an ongoing marriage and live together in a house in South Clayton. The applicant denied that the sponsor had lived at an address in Springvale saying that he had always lived with her since she came to Australia. When asked by the Tribunal if the sponsor still supported her application, the Tribunal noted the applicant's response as follows:

[29] ... She said that she told him about the hearing and he said to just do whatever she could. She said he is happy if she gives him money and if not he threatens to send her back to Vietnam. She said she is trying to save money and she really wants to have children but all he does is gamble. She said they do live together but he treats her badly.

[30] ... She said the sponsor was aware that he should attend the hearing today but he just told her to give him money or he would send her back to Vietnam.

16. Evidence was also given at the Tribunal hearing by Ms Trinh My Nga. Ms Nga said that although she had not seen the sponsor in person for about three months, she often spoke to him on the phone. The Tribunal member asked Ms Nga about the relationship between the applicant and the sponsor, setting out the evidence of Ms Nga in its decision as follows:

[33] ... She last saw the sponsor about three months ago but often talks to him on the telephone. When asked to describe their relationship she said that they were husband and wife but he is

very irresponsible and the visa applicant has to look after everything.

[34] Ms Nga then told the Tribunal that the last time she saw the sponsor he was having an affair with another person and that she was quite sure he was still having the affair and she felt he no longer loved the visa applicant.

The second s.359A notice

17. On 8 February 2006, the Tribunal wrote to the applicant inviting her to comment on the following information pursuant to s.359A of the Act:

- *The fact that your husband (who is the sponsor for the visa) Mr Van Huong Duong did not attend the hearing despite being requested to do so by the Tribunal in its letter of 21 December 2005 inviting you to a hearing.*

At the hearing you told the Tribunal that Mr Duong had not come to the hearing because he had gone out the night before and not returned home. You said that he had a gambling problem and was happy when you gave him money but if not he threatened to send you back to Vietnam. You said he was aware that he had been requested to attend the hearing.

- *Evidence given by your witness Ms My Nga Trinh at the Tribunal hearing on 7 February 2006.*

At the hearing on 7 February 2006 Ms Trinh stated that the last time she saw your husband (about 3 months ago) she felt that he no longer loved you and was having an affair. She said she was quite sure he was still having an affair as at the date of the hearing and that she had seen him with another woman.

18. The letter said that this information was relevant to the review because it raised doubts that the applicant could meet the provisions of clause 801.221(2) of the Regulations. The letter said further:

In order to satisfy subclause 801.221(2) at the time of the Tribunal's decision you must be the spouse of your sponsor and you must continue to be sponsored by him. The fact that he refused to attend the hearing raises doubts that you are still sponsored by him.

Furthermore the fact that Ms Trinh told the Tribunal she believed your husband was having an affair with another woman raised doubts that you can satisfy the definition of spouse in regulation 1.15A(1A) particularly paragraph (b)(i) that requires that you and your husband “have a mutual commitment to a shared life as husband and wife to the exclusion of all others.”

If you are unable to satisfy clause 801.221 the Tribunal will have to affirm the decision under review to refuse you a visa.

19. By letter dated 7 March 2006, the applicant’s legal representative responded to the invitation to comment in the following terms:
- a) *While the sponsor does have an addiction to gambling and alcohol and incessantly attempts to extracts (sic) as much money as possible from the review applicant, he has not withdrawn his sponsorship of the review applicant. Although his conduct and demands and threats has (sic) put tremendous pressure on the review applicant’s relationship for a considerable period of time. (sic) The review applicant has been in Australia since April 2004, almost 2 years.*
 - b) *Whilst the review applicant is unable to comment on the evidence of Ms Trinh, as she has not seen anything for herself, she does not believe that this would, assuming it to be a fact, take her relationship with the sponsor outside the definition in Regulation 1.15A on this issue.*

The Tribunal’s decision

20. In its findings and reasons at [49]-[55], the Tribunal considered the factors set out in regulation 1.15A(3). Firstly, the Tribunal considered the financial aspects of the relationship, noting that the couple had a joint bank account and that there was a handwritten lease for the period May 2005 to April 2006 indicating that the applicant and the sponsor were the tenants. Secondly, it considered the nature of the household, noting that while there was some evidence that the couple had lived together at two separate addresses, this evidence was mainly for the 2004/2005 period. Furthermore, the Tribunal noted that there was other evidence suggesting that the sponsor may have spent at least some time living at another address during that period. Thirdly, the Tribunal considered the social aspects of the relationship noting that while there were photos of the applicant and sponsor together as a

couple, this evidence was limited. Next, the Tribunal considered the nature of the parties' commitment to each other. Notwithstanding that the parties had lived at the same address for more than six months and notwithstanding that the regulations required the Tribunal to treat that fact as strong evidence that the relationship is genuine and continuing, the Tribunal found that that fact was outweighed by the other evidence before the Tribunal.

21. The Tribunal then said:

[53] The Tribunal finds the Record of the Home Visits conducted by the Departmental officers in January 2005 to be of concern. The Tribunal gives weight to this Record which indicates that the sponsor may have been living with his former wife at that time. More concerning however is the evidence of Ms Trinh at the hearing conducted on 7 February 2006 that the sponsor is in fact at the time of the Tribunal's decision having a relationship with another woman. The Tribunal also notes that the sponsor failed to attend the hearing to give evidence in support of the relationship despite the Tribunal's express request that he do so.

...

[55] The Tribunal must assess the relationship between the visa applicant and the sponsor at the time of its decision. Whilst the evidence from the home visits conducted in January 2005 raise concerns about the relationship and the issue of where the sponsor resides the Tribunal must assess the relationship at the current date. The sponsor failed to attend the hearing scheduled for 7 February 2006 despite an express request from the Tribunal that he do so and the visa applicant was unaware of his whereabouts at that time. She told the Tribunal that the sponsor still resided with her but that he often went out overnight and that he was a gambler who was happy with her when she gave him money and threatened to send her back to Vietnam if she did not. Ms Trinh, who attended the Tribunal hearing and gave evidence on behalf the visa applicant told the Tribunal that she believed the sponsor was having an affair with another person. The visa applicant was given an opportunity to respond to this information under section 359A and whilst stating that she did not know for herself, it was stated that even if the sponsor was having an affair that would not mean she was not in a spouse relationship with the sponsor. The Tribunal is unable to agree with this statement given the definition of 'spouse' in the regulations and the requirement that the visa applicant and the sponsor have a

mutual commitment to a shared life as husband and wife to the exclusion of all others.

[56] Given the evidence discussed above, the Tribunal is unable to be satisfied that the visa applicant is still in a spouse relationship with the sponsor at the time of its decision. As a result, the Tribunal is not satisfied that the visa applicant met the definition of 'spouse' as stated in regulation 1.15A at the time of decision. After considering the evidence and applying the tests outlined in Bretag and Dhillon, and keeping in mind the factors set out in subregulation 1.15A(3), the Tribunal finds that the visa applicant was not in a genuine and continuing relationship with the sponsor at the time of decision pursuant to regulation 1.15A. The Tribunal finds that at the time of decision the applicants did not have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal finds, therefore, that the visa applicant was not a spouse of an Australian citizen and does not satisfy subregulation 1.15A(1).

[57] The Tribunal finds that at the date of decision the visa applicant is no longer the spouse of the sponsoring spouse and can not meet paragraph (c) of subclause 801.221(2). Given the sponsor's failure to attend the hearing, the Tribunal can also not be satisfied that the sponsor still sponsors the visa applicant and therefore the visa applicant can no longer meet paragraph (b) of subclause 801.221(2). She therefore cannot satisfy subclause 801.221(2).

Affidavit evidence filed with this court

22. On 7 August 2006, the applicant filed an affidavit saying that:

1. *I have been advised that there are no tapes of the hearing.*
2. *I have explained the reasons as to why the sponsor did not attend the hearing. He did not do a positive act and withdraw the sponsorship. The Tribunal's finding on this point is not right. It has also failed to see the claim of domestic violence.*
3. *Assuming what the witness said was true, the Tribunal made a mistake in saying that this did not bring it within (sic) a spouse relationship of a mutual commitment to a shared life. The Tribunal has not asked the witness to clarify 'an affair'.*

Ground 1: the affair

23. The first ground contained in the application filed with the court on 25 May 2006 was as follows:

1. *In finding, on the evidence of a witness, that the sponsor “was having an affair”, the Tribunal erred in its interpretation of regulation 1.15A by concluding that even a lapse from virtue (presuming it to be the case) was indicative of there being no mutual commitment to a shared life as a husband and wife to the exclusion of all others, although there was evidence that the visa applicant and the sponsor continued to reside together for about two years.*

24. The applicant’s written submissions on this ground were as follows:

[5] The Tribunal has failed to consider the presumption in Regulation 1.15(A)(5) as to duration.

[6] The Tribunal erred in its interpretation of Regulation 1.15A by finding that person (sic) cannot be in a married relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others if one person was “having an affair”. To give such an interpretation to Regulation 1.15A is “absurd”. The Tribunal is called upon to have regard to the particular circumstances and examine the relationship in the light of these circumstances (see Tran & MIMA 126 FCR 199) which it has failed to do.

25. The first respondent’s written submissions on this ground were as follows:

[20] The respondent submits that there is no error in the MRT’s approach. The MRT looked at the evidence of the relationship at the time of the decision. The evidence was not that the applicant previously had an affair, but rather that the sponsor was currently having an affair with another woman. That evidence was put to the applicant and the applicant was unable to refute that evidence. That evidence was clearly relevant to the MRT determining whether or not a spousal relationship existed.

[21] The weight which the MRT accorded to each item of evidence was a matter for it. Suggesting that other evidence should be preferred is an attempt at impermissible merits review.

[22] In Nguyen v Minister for Immigration & Anor [2006] FMCA 657 (10 May 2006), the Federal Magistrates’ Court

considered the effect of infidelity on a spousal relationship and reg. 1.15A to conclude:

[21] The relevant part of the regulations requires the parties to have ‘a mutual commitment to a shared life as husband and wife **to the exclusion of all others**’ (emphasis added).

[22] It was argued that the infidelity of the applicant would be a relevant factor when considering the ‘mutual commitment’ and whether or not the relationship was ‘genuine and continuing’ (as required by other parts of the regulations). However, the applicant argued, his infidelity did not ‘ipso facto’ exclude a married relationship ‘as husband and wife.’

[23] The words of the regulation are clear. The ordinary meaning of ‘exclusion of all others’ in this context is a relationship where the spouses do not engage in acts of sexual intimacy with others, nor have children with others.

[24] It was suggested that the normal or generally accepted meaning of a marital relationship or marriage-like relationship excluded sexual relationship with others, save for societies where polygamy is acceptable. *[Actually, the decision of Riethmuller FM says “included” rather than “excluded”, but the passage overall would suggest that his Honour meant to say “excluded”.]* While such human foibles are tolerated, and in some areas even tacitly accepted as a part of life, they are not within the well accepted meaning of a relationship that is in the nature of husband and wife. In any event, the term "to the exclusion of all others" makes it clear that the nature of the relationship has to be one only between the husband and wife. The level of intimacy involved in a sexual relationship with another (which in this case involved fathering a child) takes the applicant outside of the definition in reg.1.15A (1A). To argue, as the applicant did, that the Tribunal had substituted its own moral judgment overlooks the clear words of the regulation.

[25] On this issue I find that the applicant does not succeed and that the MRT did not err in finding that the applicant and his wife were not in a relationship of the nature required by the regulations, at least by the time of the conception of the child. *[Actually, the decision of Riethmuller FM referred to “children”, but there was in fact only one child.]* On the facts before the MRT it does not appear that the applicant

and his wife successfully resumed their relationship following the birth of the child and therefore the question of whether or not a relationship of the type referred to in the regulations could resume after an isolated incident of intimate sexual relations with a third party does not arise in this case.

[23] The respondent submits that it was open to the MRT to find that the applicant and her spouse were not in a relationship of the nature required by reg. 1.15A.

[24] In the contentions, the applicant refers to Tran v MIMA 126 FCR 199 and states that the MRT is required to have regard to particular circumstances and examine the relationship in the light of those circumstances. The respondent submits that Tran has no application to the facts of this case. In Tran, the decision of the MRT was set aside because the MRT breached the rules of natural justice in failing to inform the witnesses that their evidence would be given little weight because they remained in the hearing room while the other witnesses gave evidence. The Court stated that the MRT should have warned the witnesses of the consequences of giving evidence in the presence of the other witnesses.

[25] Further, in obiter comments, the Court in Tran stated that the existence of a spousal relationship and the mutual commitment to a shared life must be judged in the light of one or both of the parties disability – i.e. either a mental or physical disability. There is no suggestion that either of the parties were under a disability, in the present case. Contrary to what the applicant asserts, ‘having an affair’ would not be compatible with what a spousal relationship requires pursuant to the regulations.

26. In oral submissions, the applicant argued that the Tribunal had relied solely on the ground that if the sponsor was having an affair, he was not the spouse of the applicant. It was further argued that the Tribunal had “swept under the carpet” all the other evidence that was before it that tended to support the genuineness of the marriage. The applicant relied upon the decision of Riethmuller FM in *Nguyen v Minister for Immigration & Anor* [2006] FMCA 657 at [25] which is set out above. Additionally, the applicant referred to the decision of Finkelstein J in *Tran v Minister for Immigration & Multicultural Affairs* (2003) 126 FCR 199 at paragraph 14 which is as follows:

*The second difficulty with the Tribunal's attitude to Mr Thai's illness is this. According to the Tribunal, a couple cannot be "in a married relationship" (as defined) if one of them is suffering from an illness which impairs that person's ability to fully comprehend the nature of mutual commitment and a genuine continuing relationship. A construction of reg 1.15A which produces this result is absurd and I would not adopt it unless required to do so by binding authority. I have not been able to find any such authority. I think the true position is this. **In deciding whether two parties are in a married relationship (as defined), the decision-maker is required to have regard to the particular circumstances of the relationship (reg 1.15A(3)).** Accordingly, the married relationship must be examined bearing in mind that one or other of the parties may be suffering from a physical or mental disability. Their relationship must be judged in the light of that disability, as must their shared mutual commitment. In that regard the mutuality that is required need not be co-extensive. For example, if a married person must care for his or her spouse because the spouse suffers from, say, dementia and, because of the nature of that disease, the care cannot be reciprocated, it does not follow that there is an absence of relevant "mutual commitment". (emphasis added)*

27. The applicant also relied upon the decision of Kirby J in *Re Minister for Immigration & Multicultural Affairs and Ors; Ex parte Holland* (2001) 185 ALR 504 at [16] which reads as follows:

To some extent the search upon which the tribunal embarked may have been prompted by the rigidity of the definition in the regulations requiring that the relationship, in order to be relevant to the visa application, had to be "to the exclusion of all others". Modern relationships exist, including many Australian marriages of great strength and durability, which might not meet that criterion. However, on any view, the criterion of the regulations is not concerned with the exclusion of all contact with other persons with whom there may have been an earlier marriage or relationship, or with the children of such a marriage or relationship, but with the mutual commitment of the persons concerned to a shared life with each other as a couple.

28. The applicant argued that even if one party to a relationship were having an affair, it was necessary to consider that circumstance in the context of the entire relationship. In the present case, the applicant argued that there was copious evidence that was all on one side and that established a spousal relationship. The applicant said that the

Tribunal at no point said that credibility was in issue and that the applicant was not a witness of truth. The applicant argued that it was clear that the Tribunal had decided this case purely on the basis that the sponsor's affair meant that the applicant could not succeed regardless of all of the other evidence. The applicant argued that Finkelstein J, Kirby J and Riethmuller FM had all expressed a subtle opinion on the meaning of regulation 1.15A which the Tribunal did not follow. However, the applicant did concede that if the Tribunal's approach to the affair had been that its effect on the question of mutual commitment was a matter of fact and degree, then there would have been no jurisdictional error in that regard.

29. The first respondent argued in oral submissions that the evidence was not one sided. On the contrary, the respondent pointed to the evidence summarised by the Tribunal which included evidence that:
 - a) during 2004 and 2005, the sponsor may have been living separately from the applicant;
 - b) the home visit conducted by the departmental officers in January 2005 indicated that the sponsor may have been living with his former wife at that time;
 - c) the sponsor failed to attend the hearing before the Tribunal despite the Tribunal's express request that he do so; and
 - d) the sponsor was a gambler who was happy with the applicant when she gave him money but threatened to send her back to Vietnam if she did not.
30. The first respondent argued that the Tribunal did not actually make a finding that the sponsor had had an affair but simply noted the allegation that he had had an affair.
31. The first respondent referred to the last two sentences of paragraph 55 of the Tribunal's reasons for decision, namely:

[55] ... The visa applicant was given an opportunity to respond to this information under section 359A and whilst stating that she did not know for herself, it was stated that even if the sponsor was having an affair that would not meant she was not in a spouse relationship with the sponsor. The Tribunal is unable to agree

with this statement given the definition of 'spouse' in the regulations and the requirement that the visa applicant and the sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

32. The first respondent argued that these sentences did not mean that the Tribunal was applying an absolute rule but simply that the Tribunal did not agree with the argument that the applicant had put in response to the s.359A notice. The first respondent also argued that the presumption under regulation 1.15A(5) was rebuttable and had clearly been taken into account by the Tribunal at paragraph 52 of its reasons for decision. The first respondent argued that *Tran* had no direct application to the circumstances of this case.

33. The first respondent argued that the decision in *Holland* was ultimately that there was an error of fact within jurisdiction and, in any event, the circumstances of that case were quite different. In *Holland*, the sponsor sometimes stayed with his former wife for the purposes of spending time with their children. Kirby J, at paragraph 15, noted that:

It was not remarkable, in my view, that links should have remained between [the sponsor and the applicant]. Indeed, with shared children, it would have been extraordinary if there were not still links of a familial, business and even affectionate kind between parties to such a failed marriage.

34. In submissions in reply, the applicant noted that the Tribunal had not said that the sponsor was having a relationship, but merely that he was having an affair. The applicant also reiterated that the Tribunal had eliminated from its mind all of the other evidence in the proceeding and focused entirely on the affair.

35. *Nguyen* concerned a cancellation of a spouse visa on the grounds that the applicant had given false information to the department. In Riethmuller FM's decision in that case, it appears that the statements in paragraph 24 are obiter in view of the conclusion in paragraph 25 that the applicant and his wife did not successfully resume their relationship after the woman with whom the applicant had had a sexual liaison gave birth to their child. In any event, to the extent that the decision in *Nguyen* might suggest that any sexual infidelity would necessarily take

a relationship outside the definition of spouse in the regulations, I consider, for the reasons which follow, that it is plainly wrong.

36. I note that *Nguyen* was considered on appeal by Middleton J in *Nguyen v Minister for Immigration and Multicultural Affairs* [2006] FCA 1699. His Honour considered whether infidelity would take a relationship outside the definition of spouse in the regulations in the following passage:

[25] The appellant submitted that the Tribunal concluded that the reference in the definition of spouse in sub-reg 1.15A(1A)(b)(i) to the Minister being satisfied that the parties to a marriage had a commitment to a shared life as husband and wife 'to the exclusion of all others' had the consequence that the Minister 'could never be so satisfied when infidelity was established'.

[26] The Tribunal did not make that specific conclusion. It said that the correct information was likely to have impacted on the outcome of his permanent visa application. The significance of the statement by the Tribunal is that the appellant's failure to give correct information to the Department may have enabled him to obtain a permanent spouse visa, to which he was not entitled.

*[27] The Tribunal had to consider, in deciding whether or not to cancel the appellant's visa, 'the likely effect on a decision to grant a visa...of the correct information: sub-reg 2.41(c) of the Regulations. In the present case, once the correct information became known, that is, once the appellant's wife discovered that the appellant had had an extra-marital child, the marriage ended. However, this may not be directly to the point. If the correct information had been given to the Department about the birth of the appellant's extra-marital child, even if the appellant and his wife had not separated, **it is likely that the delegate would have investigated whether the appellant's infidelity, and the circumstances surrounding it, meant that he did not have a genuine commitment to the marriage.** At the time of the cancellation, the Department had some evidence suggesting that the relationship may not have been genuine. Upon proper investigation, the delegate may have concluded that the appellant did not have a genuine commitment to a shared life as husband and wife to the exclusion of all others with his wife and the appellant's permanent visa may have been refused. Accordingly, I would not uphold this ground of appeal. (emphasis added)*

37. I take the passage in bold to mean that infidelity on the part of a party to a marriage does not necessarily mean that he or she does not meet the definition of spouse in the regulations, but that it is a matter that is to be considered, along with all the other circumstances of the relationship, in determining whether the parties had the requisite mutual commitment.
38. I consider that *Tran* is distinguishable on its facts and has no direct application to this case, although it is of course correct that “the decision maker is required to have regard to the particular circumstances of the relationship.” Similarly, *Holland* concerns a factual matrix involving a prior marriage which produced children with whom the sponsor continued very properly to be involved. It is very different to the present case.
39. In my view, the crux of the Tribunal’s decision in relation to this ground is the first sentence of paragraph 56 of the Tribunal’s reasons for decision, which reads:
- [56] Given the evidence discussed above, the Tribunal is unable to be satisfied that the visa applicant is still in a spouse relationship with the sponsor at the time of its decision. ...*
40. Unfortunately, the Tribunal did not identify with precision “the evidence discussed above”. However, a fair reading of the Tribunal’s decision is that the Tribunal meant all the evidence it had summarised in its decision but particularly the evidence discussed in the immediately preceding paragraph. That evidence was:
- a) the evidence of the home visits in January 2005 which raised concerns about where the sponsor actually lived, albeit at an earlier date;
 - b) the sponsor’s failure to attend the Tribunal hearing despite an express request from the Tribunal that he do so and the visa applicant being unaware of his whereabouts at that time;
 - c) the applicant’s evidence that the sponsor still resided with her but that he often went out overnight and that he was a gambler who was happy with her when she gave him money but threatened to send her back to Vietnam if she did not; and

d) the evidence that the sponsor was having an affair.

41. Accordingly, in my view, the Tribunal did not rely solely on the sponsor's affair in reaching its conclusion. The Tribunal had previously noted the other evidence, particularly at paragraph 23, which tended to support the applicant's claims and also appears to have accepted that the applicant and the sponsor had lived together for at least six months. However, the Tribunal correctly concluded that the presumption pursuant to regulation 1.15A(5) that cohabitation for six months or longer is to be taken as strong evidence that the relationship is genuine and continuing was a rebuttable presumption. The Tribunal was entitled on the evidence to conclude, as it did, that the presumption was rebutted in this case. The presumption was clearly considered by the Tribunal at paragraph 52 of its reasons for decision.
42. I do not consider that the Tribunal intended to say, or did say, that any infidelity on the part of the sponsor would have necessarily meant that the sponsor did not have a commitment to a shared life with the applicant as husband and wife to the exclusion of all others. If it had intended to say that, the Tribunal would not have referred generally to "the evidence discussed above" of which the affair was just one part. Nor do I consider that at the end of paragraph 55 the Tribunal was laying down an absolute rule that any sexual infidelity would take a person outside the definition of spouse in the regulations. Rather, the Tribunal was disagreeing with the applicant's claim in her response to the s.359A letter that the sponsor's affair, if any, would not take their relationship outside the relevant definition. For the reasons which follow, I consider that it was open to the Tribunal to disagree with the applicant's claim that the sponsor's alleged three month affair, in all the circumstances, would not take their relationship outside the regulations.
43. In my view, the correct interpretation of the relevant regulations is that it is a matter of fact and degree in the circumstances of the particular case whether an extra-marital sexual encounter indicates a lack of the required commitment to a shared life as husband and wife to the exclusion of all others. The regulations mean that a person is not a spouse as defined if he or she is party to another marriage-like relationship. Sex is only one part of such relationships and is

obviously not unique to such relationships. Sex does not, of itself, mean that the relationship in which it occurs is a marriage-like relationship. The regulations do not exclude a person from being a spouse as defined if he or she engages in an extra-marital sexual encounter, provided that it is not in the context of a second marriage-like relationship and provided that he or she continues to have a commitment to a shared life as husband and wife with his or her spouse.

44. It is a matter of common knowledge that there are people who remain in their marriages for 20 or 30 years or more but who nevertheless during that time have numerous, short term, extramarital sexual encounters involving no significant emotional investment. It is also a matter of common knowledge that, sometimes, a person has an extramarital affair which ends after a time and the marriage continues. In other cases, a person who has an extramarital affair eventually leaves the marriage and goes on to build a new life as husband and wife with the person with whom he or she had the affair. In such cases, there is obviously a point where the commitment to the first marriage ends. It is a matter for the Tribunal as the finder of fact to determine in all of the circumstances of the particular case whether or not an extramarital sexual encounter of one of the parties to a marriage reflects a lack of commitment to a shared life as husband and wife with the other party to the marriage, and whether or not it reflects the formation of a second marriage-like relationship.
45. In my view, it was open to the Tribunal in this case to consider that an affair which was said to have lasted at least three months was indicative of a lack of the necessary commitment. Be that as it may. The Tribunal did not actually decide that there had been such an affair. Rather, the Tribunal considered that, in light of all of the evidence, and particularly the evidence set out in paragraph 55 of the Tribunal's reasons for decision, it was not satisfied that there was a genuine spousal relationship in the circumstances of this case. The Tribunal was simply not satisfied of the necessary matters. There was no jurisdictional error in that. In all the circumstances, this ground is not made out.

Ground 2: the sponsorship

46. The second ground contained in the application was as follows:

2. *In finding that the sponsor did not attend the Tribunal hearing “despite an express request from the Tribunal to do so” and the consequential finding that the “Tribunal can also not be satisfied that the sponsor still sponsors the visa applicant and therefore the visa applicant does not meet regulation 801.221(2), the tribunal has failed to consider the definition of sponsor found in regulation 1.20 and has formed its opinion on matters that are irrelevant for consideration.*

47. The applicant’s written submissions on this ground were as follows:

[8] The Tribunal erred in its interpretation of Regulation 801 221(2)(b) by finding that because the sponsor did not attend the hearing, the tribunal could not be satisfied that the sponsor still sponsors the applicant. Factually there was no withdrawal of the sponsorship which is important and secondly the Tribunal has failed to see the meaning of sponsoring spouse as “an Australian Citizen, Australian permanent resident or eligible New Zealand Citizen who was specified in the application for the sub-class 820 (spouse) visa as the spouse of the applicant”. (See also division 1.4 of the Regulation).

48. The first respondent’s written submissions on this ground were as follows:

[26] This ground misunderstands the MRT’s findings. The MRT concluded that:

[57] ... Given the sponsor’s failure to attend the hearing, the Tribunal can also not be satisfied that the sponsor will sponsor the visa applicant and therefore the visa applicant can no longer meet paragraph (b) of subclause 801.221(2). Therefore she cannot satisfy subclause 801.221(2).

[27] The MRT was not there making a finding about whether or not Mr Duong was a sponsor in accordance with the reg 1.20 but rather whether or not ‘the applicant continues to be sponsored’ by Mr Duong pursuant to clause 801.221(2). The latter assessment involved consideration of whether the sponsor continued to support the relationship and the application.

[28] The respondent submits that it was broadly open to the MRT to make a factual finding based on the sponsor's non-attendance.

[29] Even if there is any error in this finding, and it is submitted that there is not, it would be insulated by the Tribunal's primary and independent finding that the couple were not in a spousal relationship.

49. In oral submissions, the applicant noted that, in the original application, the sponsor had given an undertaking dated 20 April 2004 which said, *"I will inform DIMIA in writing if I withdraw my support for my partner before her application is finalised."* The applicant said that the sponsor had not withdrawn his sponsorship in accordance with that undertaking. Additionally, the applicant referred to the definition of sponsoring spouse in subclause 801.111 which is as follows:

sponsoring spouse means:

- (a) the Australian citizen, Australian permanent resident or eligible New Zealand citizen who was specified in the application for the Subclass 820 (Spouse) visa as the spouse of the applicant; or*
- (b) for a person to whom the Minister has decided, under section 345, 351, 391, 417, 454 or 501J of the Act, to grant a Subclass 820 (Spouse) visa -- the Australian citizen, Australian permanent resident or eligible New Zealand citizen who was the spouse of that person at the time the visa was granted.*

50. The applicant referred to Division 1.4. of the regulations which deal with sponsorship and in particular regulation 1.20(1), 1.20(2)(a) and 1.20(2)(c), which require the sponsor to undertake to assist the applicant to the extent necessary financially and in relation to accommodation for two years. The applicant said that evidence included a tax assessment in the applicant's name and showing the address which she claimed to share with the sponsor and the evidence of the applicant's sister that the applicant and the sponsor had moved together to a new house. The applicant argued that the Tribunal was required to consider whether the sponsor had complied with his undertakings in determining whether the sponsorship continued. The applicant argued that, although the sponsor had not attended the

hearing before the Tribunal, he had not formally withdrawn his sponsorship and he had fulfilled his obligations as a sponsor.

51. The applicant also referred to the Procedure and Advice Manual (“PAM”) at schedule 2.801.2 which includes the following commentary on the definition of sponsoring spouse:

Standard meaning

Definition (a) links visa 801 eligibility back to the visa 820. The spouse relationship that is the basis for the visa 801 must be the same relationship that lead to the visa 820 being granted.

*Note that a person continues to be a **sponsoring spouse** for visa 801 purposes even if they cease to be a sponsor, for example, by withdrawing their sponsorship. (Withdrawal of a sponsorship only results in the sponsorship ceasing to have effect.)*

52. The applicant argued that the Tribunal, in deciding that it was not satisfied that the sponsor still sponsored the applicant, misinterpreted the relevant regulations.
53. The first respondent argued in oral submissions that there were two separate and independent grounds of the decision, the first being that the applicant was no longer the spouse of the sponsoring spouse and thus did not meet paragraph 801.221(2)(c), and the second being that the Tribunal was not satisfied that the sponsor still sponsored the applicant and thus did not meet paragraph 801.221(2)(b).
54. The first respondent argued that the extract from the PAM relied on by the applicant concerned only regulation 1.20 and the undertakings that were required to be given by the sponsor at the time of the application and argued that the visa criteria are a separate matter from the sponsorship requirements. The first respondent also argued that the Tribunal implicitly considered the matters relating to the sponsorship undertakings and concluded that they were insufficient to outweigh the sponsor’s failure to attend the hearing. The first respondent noted that there was no formal withdrawal of sponsorship by the sponsor and said that the system would be unworkable and contrary to public policy if the sponsorship continued until formal notice of withdrawal was given to the department regardless of the actual circumstances of the case.

55. In reply, the applicant argued that regulation 1.20 applies to the consideration of the criteria in subclasses 820 and 801.
56. In my view, the absence of a formal notice of withdrawal of sponsorship cannot of itself be taken as conclusive of whether the sponsorship is continuing. It is unrealistic to suppose that every sponsor who had ceased to support a visa applicant would dutifully and promptly send the appropriate notice to the Department. What must be considered are the realities of the sponsorship rather than the formalities.
57. The applicant argued that the sponsor was continuing to support the applicant as required by the undertakings that he had given. However, that was by no means clear on the evidence. The response to the s.359A letter in relation to this point noted that the sponsor had an addiction to gambling and “incessantly attempts to extract as much money as possible from the review applicant.” In response to the s.359A notice, no additional evidence was furnished which supported the claim that is now made that the sponsor was in fact complying with his undertakings. The evidence that had previously been provided did not show who, if anyone, was supporting whom. The applicant’s response to the s.359A letter suggested that the flow of funds was going from the applicant to the sponsor rather than the other way. The fact that the sponsor gave the required undertakings says nothing about whether or not he complied with them. The evidence, such as it was, did not substantiate the present claim that the sponsor was complying with his undertakings.
58. The PAM guidelines, in my view, are concerned with emphasising that the person who was the sponsoring spouse for the temporary subclass 820 visa must be the same person as the sponsoring spouse for the permanent subclass 801 visa. The effect of the regulations and the guidelines is that no one can be substituted as a sponsoring spouse between the time of the application for the temporary subclass 820 visa and the time of the determination of the permanent subclass 801 visa application. The guidelines are at pains to point out that if a person ceases to be a sponsor (by formally withdrawing their sponsorship or otherwise), they are still to be regarded as the sponsoring spouse for the purposes of the permanent subclass 801 visa but that withdrawal of the

sponsorship does in fact result in the sponsorship ceasing. It is not expressly stated in the PAM, but the consequence of the sponsorship ceasing by formal withdrawal or otherwise can only be that the sponsor does not still sponsor the applicant and thus the applicant cannot meet paragraph 801.221(2)(b).

59. In my view, in all the circumstances of this case, including those set out in paragraph 56 above, it was open to the Tribunal to consider that the sponsor's failure to attend the hearing, when the sponsor had been expressly requested to attend, was so significant that the Tribunal could not be satisfied that the sponsor still sponsored the applicant. There does not appear to me to have been any misinterpretation of the applicable regulations in this regard.

60. There was some argument at the hearing about the Tribunal's statement in paragraph 55 that the applicant was unaware of the sponsor's whereabouts at the time of the hearing. The Tribunal summarised the evidence on this point at paragraph 25 of its reasons as follows:

The Tribunal asked her why the sponsor was not present at the hearing despite the Tribunal advising her that it wished to take evidence from him. She replied that the sponsor was committed to gambling and had not agreed to attend. He had gone out late last night and had not returned home this morning.

61. The applicant's evidence was that the sponsor had gone out somewhere the previous night. There was possibly an implication that the sponsor had gone to an unspecified location to gamble and was perhaps still there. However, the applicant did not say that she knew where the sponsor was or that she knew where he conducted his gambling. The Tribunal's inference from the applicant's evidence that she did not know the sponsor's actual whereabouts was reasonable. In any event, the Tribunal's inference was at worst a mistake of fact within jurisdiction. In all of the circumstances, I find that ground 2 is not made out.

Ground 3: s.359A notice

62. The third ground contained in the application filed with the court on 25 May 2006 was as follows:

3. *The Tribunal has failed to correctly interpret and discharge its obligations in respect of the section 359A notice in that:*

(a) *it failed to ask of the witness what was meant by saying “was having an affair”;*

(b) *failed to put to the applicant how “was having an affair” would impact on the definition of a spouse found in regulation 1.15A particularly the visa applicant claimed that she and her spouse still lived together and that she was unaware of the witness’s evidence that the sponsor “was having an affair”.*

63. The applicant’s written submissions on this ground were as follows:

[7] In addition the Tribunal’s sect 359A notice does not explain to the applicant what is meant by “having an affair” and how this would impact on the interpretation of spouse. The Tribunal has failed to give the section 359A notice in accordance with the law, and in the content (sic) of the relevance of both parties continuing to reside at the same address.

64. The first respondent’s written submissions on this ground were as follows:

[30] This ground is expressed in two parts. The first is misplaced and not a ground of legal error. The section 359A letter is a notice addressed to the applicant to comment on information that was before the MRT. It is not a notice to a particular witness to elucidate her evidence.

[31] The second claim similarly cannot be sustained. The section 359A letter put the applicant on notice about adverse information that was before the MRT. The MRT invited the applicant to comment on whether the applicant met the relevant criteria for the grant of the visa, in light of that information. The MRT was not obliged to divulge its thought processes: Abebe v Commonwealth (1999) 197 CLR 510 at 576 [187].

[32] In her contentions, the applicant states that the section 359A letter did not inform of the relevance of both parties continuing to reside at the same address. This is not correct. The section 359A letter put the whole of the record of home visits to the applicant. It told the applicant that the information that the sponsor lived with his ex-wife and had travelled to Vietnam with the ex-wife, raised doubts as to whether they were in a genuine spousal relationship as defined in the regulations. The applicant who was

represented did not provide any evidence that this was not the case.

65. In oral submissions, the applicant argued that the Tribunal was required by s.359A(1)(b) to explain why information given to the applicant was relevant to the review. Section 359A(1) provides as follows:

(1) Subject to subsection (2), the Tribunal must:

- (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
- (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and*
- (c) invite the applicant to comment on it.*

66. The applicant referred to the decision of the Full Court of the Federal Court in *SZEEU v Minister for Immigration & Multicultural Affairs* [2006] FCAFC 2 at [119] where reference was made to the requirement to “explain to the applicant why that information is relevant to the review”. The applicant argued that the Tribunal did not adequately explain why the information provided in the s.359A letter, in relation to the sponsor’s affair, was relevant to the review.

67. The first respondent said in oral submissions that the Tribunal’s explanation was adequate. The section 359A letter relevantly stated:

Furthermore, the fact that Ms Trinh told the Tribunal she believed your husband was having an affair with another woman raises doubts that you can satisfy the definition of spouse in 1.15A(1A), particularly paragraph (b)(i) that requires you and your husband “to have a mutual commitment to a shared life as husband and wife to the exclusion of all others.”

If you are unable to satisfy clause 801.221 the Tribunal will have to affirm the decision under review to refuse you a visa.

68. The first respondent referred to the decision of Smith FM in *SZELA v Minister for Immigration & Anor* [2005] FMCA 1068 at [51] where the notice was found to have been inadequate on the basis that it provided

no express explanation of the relevance of the information. The notice had said “this information is relevant because...the Document Examiner advises that this document is fraudulent.” His Honour held that such an explanation was inadequate. The first respondent submitted that the present case was very different because in the present case the Tribunal did in fact explain the relevance of the information.

69. In reply, the applicant argued that all the Tribunal had done was say that the information meant that the applicant might not be able to meet the definition of spouse and that explanation did not satisfy s.359A of the Act.
70. No oral submissions were advanced by the applicant that the Tribunal had erred in failing to ask the applicant what was meant by saying the sponsor “was having an affair”. Thus, the applicant did not press that particular ground. In any event, I accept the first respondent’s submission that there is no obligation under s.359A of the Act to ask the applicant what particular evidence meant. Similarly, the applicant’s written contentions to the effect that the s.359A notice is flawed because it does not explain to the applicant what is meant by “having an affair” was not pursued in oral submissions. In any event, I do not consider that s.359A of the Act imposed any obligation to explain that phrase. It is a matter of common usage.
71. Section 359A(1)(b) of the Act requires the Tribunal to “ensure **as far as is reasonably practicable**, that the applicant understands why [the information] is relevant to the review.” (emphasis added). Section 359A(1)(b) does not require the Tribunal to embark on an elaborate or detailed explanation of the relevance of the information that has been provided. It simply requires the Tribunal to point out to the applicant in a comprehensible way the significance of the information that has been provided. In my view, the Tribunal did that in this case. The Tribunal explained that the allegation of the affair raised doubts that the applicant and the sponsor had the necessary mutual commitment. It is difficult to see how the matter could have been put any more clearly. Moreover, the response to the s.359A notice indicates that the applicant, or at least her advisers, understood the relevance of the

information. That, in itself, suggests that the explanation was adequate. In the circumstances, this ground is not made out.

Ground 4

72. The fourth ground contained in the application filed with the court on 25 May 2006 was formally abandoned at the hearing before this court.

Conclusion

73. In the circumstances, the application must be dismissed with costs.

I certify that the preceding seventy-two (72) paragraphs are a true copy of the reasons for judgment of Riley FM

Associate: Melissa Gangemi

Date: 21 March 2007